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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES EDWARD BAKER, JR.,

Defendant and Appellant.

C043713

(Super. Ct. No. SF082622A)

A jury convicted defendant Charles Edward Baker, Jr., of assault with a deadly weapon (a knife) or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)--count 2),<sup>1</sup> battery with serious bodily injury (§ 243, subd. (d))--count 3), infliction of corporal injury on a spouse, cohabitant, or parent of his child (§ 273.5,

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<sup>1</sup> Further undesignated section references are to the Penal Code.

subd. (a)--count 4), and criminal threats (§ 422--count 5).<sup>2</sup> As to each offense, the jury found defendant personally used a dangerous or deadly weapon (a knife). (§ 12022, subd. (b)(1).) As to each offense (with the exception of the criminal threats), the jury further found that defendant had personally inflicted great bodily injury on the victim under circumstances involving domestic violence. (§ 12022.7, subd. (e).)

The trial court found that defendant had a prior serious felony conviction (§ 667, subd. (a)) and four strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). The trial court denied defendant's motion to strike his prior convictions and imposed an aggregate prison sentence of 36 years to life (with concurrent sentences for each count).<sup>3</sup>

On appeal, defendant claims that the trial court had a sua sponte duty to give two additional instructions concerning his claim of self-defense. As a fallback argument, he claims his counsel was ineffective for failing to request these instructions. He also claims the court abused its discretion by

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<sup>2</sup> The jury was unable to reach a unanimous verdict on a charge of attempted murder (§§ 187, subd. (a), 664--count 1), and the trial court dismissed the charge on motion of the prosecutor.

<sup>3</sup> Appellate counsel has written a letter to the trial court indicating the abstract of judgment erroneously designates defendant's principal term as count 3 rather than count 2. But count 3 is properly designated as the principal term because the sentence for that offense, with the related enhancements, is greater. (See *People v. Chagolla* (1983) 144 Cal.App.3d 422, 433, fn. 1; § 1170.1, subd. (a).)

declining to dismiss the three prior strikes of which he was convicted in 1984. We reject defendant's claims.

However, the People point out that the trial court should have stricken one weapon enhancement rather than staying it, and we agree. Further, our review of the record indicates that the court should have stayed the sentences for two counts pursuant to section 654 rather than imposing concurrent sentences. In the interest of judicial economy, we elect to correct these errors without supplemental briefing. Any party wishing to address these issues may petition for rehearing. (Gov. Code, § 68081.)

#### **FACTS**

##### ***A. Defendant's Prior Record and Background***

Defendant's record as both a juvenile and adult includes multiple violent incidents. For example, when he was only 16 years old, he entered a no contest plea in juvenile court to assault with a deadly weapon after shooting his mother's boyfriend in a domestic dispute. However, we note that the probation report indicates that the victim in that incident allegedly used narcotics and mistreated defendant's mother and the children.

Defendant's four prior strikes involve adult convictions for offenses arising from two separate incidents. First, defendant was convicted of two counts of forcible rape and one count of forcible oral copulation stemming from a 1983 incident in which the victim was a female hitchhiker who defendant and

another man had picked up. Second, defendant was convicted of assault with a deadly weapon or by means of force likely to produce great bodily injury following a 1998 incident in which he threatened his wife and then came close to hitting her with a vehicle. Including the strike offenses, defendant's adult record includes at least seven felonies and five misdemeanors.

Defendant reported that he had been self-employed as a truck driver since 1998. He also admitted he was addicted to rock cocaine and had used it to stay awake when driving his truck. He was 39 years old at the time of the incident in the current case.

**B. *Current Offenses***

Defendant and the victim were married at the time of the offenses (July 2001), but defendant had been participating in a residential drug treatment program. Defendant and the victim were on good terms, and the victim spent the day with defendant on July 3 and took him back to the drug rehabilitation center.

On July 4, the victim, her stepsister, Tracey, and Tracey's five-year-old son went to San Francisco to see the fireworks. After midnight, the victim's daughter, Shantillia, found defendant on the porch of the victim's house and noticed the door, which had been locked when she left, was open. Defendant asked where the victim was and eventually told Shantillia to call her for him. Shantillia contacted the victim a couple of times for defendant by calling Tracey's cell phone. According to the victim, defendant said he wanted to talk to her when she

got home and indicated he was tired of the mess she was putting him through.

When the victim, Tracey, and Tracey's son returned, defendant approached and demanded that the victim get out of the car because he wanted to talk to her. The victim said she needed to take some things into the house first, and defendant helped her. Tracey and her son also went inside. Afterwards, defendant and the victim went outside because defendant wanted to speak with her alone.

The victim turned around to talk to defendant when they were in the yard, and he punched her in the eye. The victim was not injured. Defendant subsequently threw her to the ground, pulled out a knife, and said he was "tired of [her] mess" and was going to kill her. He was moving the knife in a sideways motion while the victim was on the ground, and he ended up cutting her right hand when she put it up to defend herself. She asked defendant why he cut her, and defendant told her to shut up and not to scream or he would kill her. The victim screamed.

Tracey testified that she ran outside after hearing the victim screaming, and she saw defendant holding the knife up and the victim bleeding from the neck. When Tracey asked why defendant was doing "this," he "just kept stabbing" the victim. Shantillia testified that when she went outside, she could not tell if the victim was bleeding. Shantillia called 911. The victim remembered Tracey telling him to stop and defendant telling Shantillia he would kill the victim if Shantillia called

the police; the victim said the next thing she knew defendant was stabbing her. According to Shantillia, defendant repeatedly said he was going to kill the victim.

Tracey screamed at defendant and pushed him. Defendant threw his knife down and started to leave, but then came back, picked it up, and ran away. Shantillia threw down the phone, went inside to get a knife, and then pursued defendant until he eventually turned around and threatened her. When defendant was arrested that night, police did not notice any injuries on him or recall him complaining of any. A knife handle was found in the front yard of the victim's residence, but the blade was not recovered.

The victim sustained multiple stab wounds, including lacerations to her neck, hands, fingers, back, buttocks and legs. Some of the wounds were superficial and some more serious; one serious injury was a cut in her left hand that penetrated the bone. The victim testified at trial concerning how she was injured: "At first when he threw me down, he was sitting on me. And I guess somewhere during the incident I ended up turning over and I ended up on my stomach. And that's how I got stabbed in the neck and in the back."

Evidence was also presented at trial concerning a prior incident involving the same victim that occurred on Thanksgiving in 1998. Defendant threatened to hurt the victim and went into the kitchen, and it sounded as if he was getting something from the silverware drawer, such as a knife. The victim grabbed the

phone and ran outside, but defendant also went outside and nearly hit her with his truck.

### **C.     *Defense***

Defendant testified in his own defense. He said he had wanted to talk to the victim about his plan to go back to work as a truck driver. He admitted he had asked the victim to come talk to him outside, but he claimed she brandished a knife after he skipped a step going down the stairs. Defendant got cut and then struggled with the victim to get the knife, and she cut herself in the process. The victim yelled, and Shantillia and Tracey came outside carrying knives. Defendant grabbed the victim by her ponytail and tried to place her between himself and the other women. Tracey tried to stab him but must have ended up hitting the victim, and Shantillia was also moving her knife around. Further, defendant might have inadvertently stabbed the victim during the altercation. When Tracey's son came outside, defendant saw an opening to escape.

Defendant also testified about an incident that occurred some time around the spring of 1984, in which the victim purportedly shot at him after catching him with another woman.

## **DISCUSSION**

### **I.     *Self-Defense Instructions***

Defendant claims the trial court had a sua sponte duty to give two additional instructions concerning his claim of self-defense. As a fallback argument, he claims his counsel was

ineffective for failing to request the instructions. We address each of these issues in turn.

**A. Antecedent Threats or Assaults**

First, defendant claims that, based on the 1984 shooting incident, the trial court should have instructed the jury concerning antecedent threats or assaults by the victim because it related to the reasonableness of his perceived need to defend himself. A model for this type of instruction is now included in the CALJIC jury instructions as CALJIC No. 5.50.1, which is a relatively new instruction first appearing in 2003. (CALJIC No. 5.50.1 (7th ed. 2003).)<sup>4</sup>

The trial court's sua sponte duty to instruct the jury on the general principles of law relevant to the issues presented extends to defenses. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) However, an instruction on antecedent threats or assaults is a clarifying or "pinpoint instruction" tying

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<sup>4</sup> CALJIC No. 5.50.1 provides: "Evidence has been presented that on [a] prior occasion[s] the alleged victim [threatened] [or] [assaulted] [or participated in an assault or threat of physical harm upon] the defendant. If you find that this evidence is true, you may consider that evidence on the issues of whether the defendant actually and reasonably believed [his] [her] life or physical safety was endangered at the time of the commission of the alleged crime.

"In addition, a person whose life or safety has been previously threatened, or assaulted by [another] [others] is justified in acting more quickly and taking harsher measures for self protection from an assault by [that person] [those persons], than would a person who had not received threats from or previously been assaulted by the same person [or persons]."



specific evidence to theories applicable to a particular case; this type of instruction does not concern any general legal principle. (*Id.* at pp. 488-489.) The trial court has no duty to give a pinpoint instruction unless it is requested. (*Id.* at p. 489.)

As a fallback argument, defendant suggests his counsel was ineffective for failing to request this instruction. To prevail, defendant must show his counsel's representation fell below an objective standard of reasonableness and, but for counsel's error, there is a reasonable probability of an outcome more favorable to defendant. (See *People v. Frye* (1998) 18 Cal.4th 894, 979 (*Frye*).) Further, defendant is not entitled to relief on direct appeal unless the record affirmatively shows counsel had no rational tactical reason for the act or omission challenged. (*Id.* at pp. 979-980.)

Defendant has not shown his counsel was ineffective. The probative value of the evidence of antecedent threats or assaults is weak. The shooting incident allegedly occurred more than 15 years before the incident here. Counsel could have reasonably concluded it would be best to argue the point but not request a specific instruction, particularly in light of the evidence of much more recent threats and violence by defendant against the victim that resulted in a felony conviction. Further, there is nothing to directly connect the shooting with the current offense in that the prior incident purportedly occurred after defendant cheated on the victim and that matter had long since been resolved. And here, defendant's testimony

indicates the victim acted without any such provocation. In short, defendant has not shown his counsel acted unreasonably by failing to request the instruction or that he was prejudiced as a result.

**B. Burden of Proof Concerning Self-Defense**

Second, defendant claims the trial court should have given an instruction explaining the burden of proof with respect to a claim of self-defense. Defendant suggests that an instruction modeled after CALJIC No. 5.15, which applies to murder, should have been given. CALJIC No. 5.15 states: "Upon a trial of a charge of murder, a killing is lawful if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

Some prior authority suggests this type of instruction is a pinpoint instruction that need not be given if it is not requested. (See *People v. Sandoval* (1970) 9 Cal.App.3d 885, 887-888; see also *People v. Adrian* (1982) 135 Cal.App.3d 335, 337-341.) But defendant claims this authority is inconsistent with Evidence Code section 502, which provides that the trial court must fully instruct the jury concerning the burden of proof.<sup>5</sup> In fact, recent cases by the state Supreme Court have

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<sup>5</sup> Evidence Code section 502 provides: "The court on all proper occasions shall instruct the jury as to which party bears the

suggested that the court's obligation pursuant to Evidence Code section 502 to clarify the burden of proof may extend to cases involving certain defenses. (*People v. Mower* (2002) 28 Cal.4th 457, 483-484; *People v. Simon* (1995) 9 Cal.4th 493, 501.)

Whatever the precise limits of the trial court's duty to instruct, we find no prejudicial error here because the instructions that were given adequately conveyed to the jury that the prosecution retained the burden of proof to defeat a self-defense claim. Pursuant to CALJIC Nos. 9.00 and 9.12, the jury was instructed that assault (necessary to show assault with a deadly weapon) and battery with serious bodily injury both required a finding that defendant acted unlawfully. These instructions further clarified it was the People's burden to show defendant did not apply or use force in lawful self-defense and the jury must find him not guilty if it had a reasonable doubt whether this was the case. After receiving these instructions, the jury nevertheless convicted defendant of these offenses.<sup>6</sup>

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burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."

<sup>6</sup> Even assuming similar language should have been included in the instruction on the domestic violence charge (§ 273.5, subd. (a)), any error was necessarily harmless in light of the other instructions and the jury's verdict. As we shall explain, *infra*, all three offenses arose out of the same facts.

## **II. Refusal to Dismiss Prior Strikes**

Defendant claims the trial court abused its discretion by declining to dismiss the three prior strikes from the early 1980s. We disagree.

### **A. Background**

Defense counsel moved to dismiss the three prior strikes. Among the factors counsel cited were the remoteness of the offenses, defendant's troubled childhood, and his attempts to lead a productive life by working and seeking drug rehabilitation.

The trial court explained its decision not to dismiss any of the strikes as follows: "Defendant has a long, continuing history and contact with the criminal justice system; it involves violence and great violence from time to time.

"Mr. Arthur [defense counsel], I agree that it is remarkable that he was attempting to maintain employment at or around the time of this event. Seems to have been in some sort of rehabilitation program.

"Mr. Baker has comported himself as a very -- in a very gentlemanly way, frankly, during every appearance. It's almost more distressing for the Court to see an individual who is capable of acting in such a rational way yet obviously acting in

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We likewise reject defendant's argument that his counsel was ineffective for failing to request additional instructions. Counsel could have reasonably relied on the instructions that were given, and defendant could not have been prejudiced by the failure to request additional instruction. (See *Frye, supra*, 18 Cal.4th at p. 979.)

such an irrational way even after his many contacts with the criminal justice system, his -- the efforts of this victim to assist him in his rehabilitation program within 24 hours of this attack. It makes the Court feel, and I conclude, that he is not outside the spirit of the Three Strikes law, unfortunately.

"He continues to act in a violent manner. This obviously was a rather vicious attack from the rear, and a vulnerable victim, with no seeming rationale, certainly no provocation.

"The Court finds that based on his prior history, his background, character and prospects, the nature of this particular offense, that I decline to strike any of the prior strike allegations[.]"

#### **B. Analysis**

In determining whether to dismiss a prior strike or strikes pursuant to section 1385, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellate courts review a trial court's findings for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing

decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.''' "Second, a ``decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.''' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

The trial court did not abuse its discretion here. The current incident and defendant's prior record indicate that he has been and remains a violent criminal. The court acknowledged that defendant was trying to work and seek drug rehabilitation but properly found the positive factors in the case were insufficient to show he fell outside the spirit of the Three Strikes law.

### **III. *Enhancement Must be Stricken***

The People point out that the trial court should have stricken the weapon enhancement (§ 12022, subd. (b)(1)) attached to count 2 rather than staying it. We agree and will do so. (See *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070; *People v. McGee* (1993) 15 Cal.App.4th 107, 116-117.)

#### **IV. Penal Code Section 654**

Our review of the record indicates that three of the four counts arose from the same indivisible course of conduct and that defendant is entitled to a section 654 stay of two of the counts. The three counts at issue are count 2, assault with a deadly weapon (a knife) or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)); count 3, battery with serious bodily injury (§ 243, subd. (d)); and count 4, infliction of corporal injury on a spouse, cohabitant, or parent of his child (§ 273.5, subd. (a)). As to each count, the jury found defendant had personally used a dangerous or deadly weapon (a knife) (§ 12022, subd. (b)(1))<sup>7</sup> and inflicted great bodily injury on the victim under circumstances involving domestic violence. (§ 12022.7, subd. (e).)

"Section 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act. [Citations.] The 'act' which invokes section 654 may be a continuous "course of conduct" . . . comprising an indivisible transaction . . . .' [Citation.] 'The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may

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<sup>7</sup> As explained in section III, *infra*, the weapon enhancement that applied to count 2 shall be stricken.

impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.) The determination of whether there was more than one objective is a factual determination, which will not be overturned on appeal unless substantial evidence does not support it. (*Id.* at p. 339.)

Here, the knife attack on the victim as a whole was used to support the three charges as well as the related weapon and great bodily injury enhancements. The prosecutor did not attempt to develop evidence suggesting defendant acted with different objectives during the single incident. In fact, in his closing argument the prosecutor did not attempt to differentiate the conduct underlying the three offenses (or the attempted murder charge (of which defendant was not convicted)). The prosecutor explained: "And it may seem like a bit of an overkill, the first four counts. They all essentially -- the act of the defendant stabbing her, and injuries she suffered and when you step back and take a look at 'em. [*Sic.*] But the reasons for the charging, [*sic*] and that's really about all there is to say about it."

Further, at sentencing the parties agreed that section 654 was applicable. Defense counsel asked the trial court "to consider the obvious application of Penal Code section 654." The court commented to the prosecutor, "And [defense counsel] obviously is asking that I either stay or run concurrent some of



these terms. Did you wish to speak to that?" The prosecutor suggested the court impose *concurrent* sentences for two of the counts pursuant to section 654. The court subsequently imposed concurrent sentences for the two counts without comment, but when it imposed a concurrent sentence for the separate, criminal threats offense (count 5), the court specifically found it arose out of the same set of operative facts on the same occasion. Accordingly, it appears the court might have believed (as the prosecutor apparently did) that imposition of concurrent sentences for the other offenses was consistent with section 654.

Under the circumstances, we find it unnecessary to remand the matter for resentencing and hold that the concurrent sentences imposed for the two offenses (and related enhancements) should be stayed pursuant to section 654. (See *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744.) It does not matter that the sentences were concurrent (see *People v. Deloza* (1998) 18 Cal.4th 585, 594), or that defendant failed to specifically object. (See *People v. Hester* (2000) 22 Cal.4th 290, 295 [waiver does not apply to section 654 issue unless defendant agreed to sentence as part of plea].)

#### **DISPOSITION**

The judgment is modified to stay the sentences imposed for counts 2 and 4 (and related enhancements) pursuant to section 654, and to strike the weapon enhancement (§ 12022, subd. (b)(1)) that attached to count 2. The trial court is

directed to amend the abstract of judgment to reflect these changes and to forward a certified copy of the amended abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

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DAVIS, J.

We concur:

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BLEASE, Acting P.J.

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BUTZ, J.